

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

MARLON LORENZO BROWN,

Plaintiff

v.

DANTE TROMBA, et. al.,

Defendants

Case No.: 2:17-cv-02396-APG-BNW

**Order Granting Defendants' Motion to  
Dismiss**

[ECF No. 140]

Plaintiff Marlon Lorenzo Brown sues the Las Vegas Metropolitan Police Department (LVMPD) and former LVMPD sergeant Dante Tromba under 42 U.S.C. § 1983 and Nevada law for alleged violations arising out of Brown's arrest while on bond.<sup>1</sup> The operative complaint is Brown's fourth amended complaint (FAC) at ECF No. 114. The only remaining claims are: (1) judicial deception against Tromba under 42 U.S.C. § 1983 and (2) intentional infliction of emotional distress against Tromba and LVMPD. These claims are based on Tromba allegedly forward-dating documents to make it appear that Brown was arrested a day later than he was and then giving those documents to the state court to fool it into believing that Brown had been taken into custody due to his bail bond being surrendered when actually Tromba had arrested Brown. Brown alleges that because of this deception, the state court kept him in pretrial custody even though the bond had not yet been surrendered or exonerated.

LVMPD and Tromba move to dismiss the remaining claims as barred by *Heck v. Humphrey*, 512 U.S. 477 (1994). They argue that *Heck* bars the claims because Brown challenges his pretrial detention, which was incorporated into his sentence as credit for time

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<sup>1</sup> LVMPD and Tromba are the only defendants named in the fourth amended complaint.

1 served, but the propriety of that detention has never been overturned through appeal or a habeas  
2 corpus petition. They also seek fees and costs for having to litigate this case for years based on  
3 Brown previously resisting dismissal on *Heck* grounds and then pursuing the same claims for  
4 relief in a federal habeas corpus petition.

5       Brown responds by requesting additional time to gather facts needed to oppose the  
6 motion under Federal Rule of Civil Procedure 56(d). ECF No. 145. He asserts that he does not  
7 know what his former counsel argued in this case, that he believed this case was stayed while he  
8 was litigating a habeas petition in state court, and that he has not seen the operative FAC so he  
9 cannot respond to the defendants' motion. In various other documents, Brown argues that *Heck*  
10 does not bar his claims because *Heck* involved a malicious prosecution claim and this case  
11 involves illegal arrest and false imprisonment, and because his claims in this case do not  
12 undermine the validity of his conviction or sentence as he is seeking damages for a period of  
13 pretrial detention that has since concluded. *See* ECF Nos. 155 at 3-6; 158 at 19-20. Brown  
14 contends that because he received credit on his sentence for the time he spent in pretrial custody,  
15 he is not seeking to undermine his conviction or sentence by challenging the constitutionality of  
16 that pretrial detention. *See* ECF No. 158 at 19-20. He also argues that the legality of his pretrial  
17 detention has nothing to do with the underlying facts of his convictions because his bail was  
18 revoked based on the defendants' judicial deception, while the underlying offenses for which he  
19 was convicted involving domestic violence have nothing to do with the reasons why his bail was  
20 revoked. *Id.* at 20.

21       The parties are familiar with the facts, so I repeat them here only as necessary to resolve  
22 the motion. I grant the defendants' motion because Brown's claims are barred by *Heck*. I deny  
23 the defendants' request for fees and costs.

1 **I. AFFECT OF NOTICE OF APPEAL**

2 Brown has filed a notice of appeal related to my order adopting Magistrate Judge  
 3 Weksler’s report and recommendation denying Brown leave to amend. *See* ECF Nos. 148; 159;  
 4 171; 172. My order denying leave to amend is not a final appealable order because it did not  
 5 resolve all claims against all parties in this case. *See Hall v. City of Los Angeles*, 697 F.3d 1059,  
 6 1070 (9th Cir. 2012); *Horner v. Ferron*, 362 F.2d 224, 230 (9th Cir. 1966) (stating that “denial of  
 7 [a] motion to file [an] amended complaint . . . in [a case that] is still pending[] was not a final and  
 8 appealable order”); Fed. R. Civ. P. 54(b). “When a Notice of Appeal is defective in that it refers  
 9 to a non-appealable interlocutory order, it does not transfer jurisdiction to the appellate court, and  
 10 so the ordinary rule that the district court cannot act until the mandate has issued on the appeal  
 11 does not apply.” *Nascimento v. Dummer*, 508 F.3d 905, 908 (9th Cir. 2007). Accordingly, I may  
 12 resolve the pending motions in this case despite the notice of appeal.

13 **II. MOTION TO DISMISS (ECF No. 140)**

14 Brown’s claims are *Heck*-barred “if success in the action would necessarily demonstrate  
 15 the invalidity of the duration of a prisoner’s confinement no matter the relief sought.” *Hebrard v.*  
 16 *Nofziger*, 90 F.4th 1000, 1010 (9th Cir. 2024) (simplified). “So long as the claim indirectly  
 17 seeks a judicial determination that necessarily implies the unlawfulness of the duration of the  
 18 State’s custody,” the claim must be dismissed because “only habeas corpus (or similar state)  
 19 remedies can be used to obtain such a ruling.” *Id.* (simplified). This includes challenges to  
 20 pretrial detention. *See Ippolito v. Just. Serv. Div.*, 562 F. App’x 690, 692 (10th Cir. 2014)  
 21 (holding that “*Heck* precludes recovery of damages for Mr. Ippolito’s pretrial detention in the  
 22 absence of a prior award of habeas relief”); *see also Muhammad v. Close*, 540 U.S. 749, 750  
 23 (2004) (“Challenges to the validity of any confinement or to particulars affecting its duration are

1 the province of habeas corpus.”). Thus, a plaintiff “cannot recover damages in a § 1983 suit if a  
2 judgment in favor of the plaintiff ‘would necessarily imply the invalidity of his conviction or  
3 sentence . . . unless the plaintiff can demonstrate that the conviction or sentence has already been  
4 invalidated.’” *Guerrero v. Gates*, 442 F.3d 697, 703 (9th Cir. 2006) (quoting *Heck*, 512 U.S. at  
5 487). If a suit is barred by *Heck*, the proper remedy is dismissal without prejudice to the plaintiff  
6 filing a civil suit if the conviction or sentence is later invalidated. *Trimble v. City of Santa Rosa*,  
7 49 F.3d 583, 585 (9th Cir. 1995); *see also Edwards v. Balisok*, 520 U.S. 641, 649 (1997).

8         The Ninth Circuit has recognized an exception to allow a former prisoner to bring § 1983  
9 claims despite the *Heck* bar where habeas relief became unavailable as moot because the prisoner  
10 was released from custody. *Nonnette v. Small*, 316 F.3d 872, 877-78 (9th Cir. 2002). However,  
11 this exception “affects only former prisoners challenging loss of good-time credits, revocation of  
12 parole or similar matters” who timely pursued habeas corpus or similar relief while in custody,  
13 but whose petitions were mooted because they were released from custody before they could get  
14 a ruling. *Id.* at 878 n.7; *see also Cunningham v. Gates*, 312 F.3d 1148, 1153 n.3 (9th Cir. 2002),  
15 *as amended on denial of reh’g* (Jan. 14, 2003) (rejecting the argument that because the plaintiff  
16 was time-barred from seeking habeas relief, he was essentially out of custody for purposes of  
17 *Heck*). The Ninth Circuit has made clear that the *Nonnette* exception does not apply to a  
18 challenge of a conviction regardless of whether the prisoner is out of custody. *Guerrero*, 442  
19 F.3d at 705.

20         Brown’s allegations that Tromba falsified documents to fool the state court into keeping  
21 Brown in custody would necessarily imply the invalidity of his pretrial detention, and Brown has  
22 not alleged that his pretrial detention has been invalidated. Brown filed a federal habeas corpus  
23 petition seeking to overturn his conviction based on the same facts alleged in this case. *Brown v.*

1 *Breitenbach*, 3:23-cv-00148-MMD-CLB, ECF No. 1-1 at 8-10, 34-37 (D. Nev. Apr. 10, 2023).  
2 In a motion to stay filed in the case before me, Brown admitted that the federal habeas petition  
3 “involves the same facts against the same Defendants” as this case. ECF No. 136 at 2. Because  
4 Brown’s habeas petition challenges his conviction based on these same facts, this lawsuit is  
5 barred by *Heck* unless Brown can show his pretrial detention has been invalidated. But the  
6 district court denied his federal habeas petition, and the matter is currently pending before the  
7 Ninth Circuit. *Brown v. Breitenbach*, 3:23-cv-00148-MMD-CLB, ECF Nos. 55; 60 (D. Nev.  
8 June 4, 2024; June 12, 2024). Accordingly, as of this date, his pretrial detention has not been  
9 invalidated.<sup>2</sup>

10 The *Nonnette* exception to *Heck* does not apply because Brown challenges his conviction  
11 in his federal habeas petition based on these same facts. Additionally, Brown is still in custody  
12 (albeit not in pretrial custody) and does not challenge “loss of good-time credits, revocation of  
13 parole or similar matters.” *Nonnette*, 316 F.3d at 878 n.7. Even if a challenge to pretrial  
14 detention falls within *Nonnette*’s reference to “similar matters,” *Nonnette*’s exception still would  
15 not apply because Brown did not timely pursue habeas relief while on pretrial detention.  
16 Although he filed a habeas petition with the Supreme Court of Nevada,<sup>3</sup> he failed to pursue three  
17 different federal habeas petitions that he filed while still in pretrial custody. *See Brown v. Eighth*  
18 *Judicial District Court*, 2:17-cv-02644-MMD-GWF, ECF No. 3 (D. Nev. Oct. 16, 2017)  
19 (dismissed without prejudice because Brown did not pay the filing fee or an application to  
20 proceed in forma pauperis); *Brown v. Eighth Judicial District Court*, 2:17-cv-02708-JCM-GWF,

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22 <sup>2</sup> Brown also challenged his pretrial detention in state court, but the pretrial detention was never  
23 invalidated. *See, e.g.*, ECF Nos. 162-1 at 30; 162-16 at 2; 162-17 at 6, 10-14; 162-18 at 2; 162-19  
at 2.

<sup>3</sup> *See* ECF Nos. 162-16 at 2 (petition); 162-19 at 2 (denying relief).

1 ECF No. 3 (D. Nev. Oct. 27, 2017) (same); *Brown v Lombardo*, 2:17-cv-02811-GMN-VCF, ECF  
2 No. 4 (D. Nev. Jan. 18, 2018) (dismissed without prejudice for lack of exhaustion and on  
3 abstention grounds after Brown failed to respond to an order to show cause). I therefore dismiss  
4 this action without prejudice as barred by *Heck*.

5 **III. CONCLUSION**

6 I THEREFORE ORDER that the defendants' motion to dismiss (**ECF No. 140**) is  
7 **GRANTED in part**. This case is dismissed under *Heck v. Humphrey*, 512 U.S. 477 (1994),  
8 without prejudice to plaintiff Marlon Brown filing a new lawsuit if his pretrial detention is  
9 invalidated in another proceeding. I deny the defendants' request for fees and costs.

10 I FURTHER ORDER that all other pending motions are denied as moot, and the clerk of  
11 court is instructed to close this case.

12 DATED this 19th day of August, 2024.

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15 ANDREW P. GORDON  
16 UNITED STATES DISTRICT JUDGE  
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